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In the Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether title insurance companies' collective establishment of rates for separately charged title search and examination services constitutes the "business of insurance" within the meaning of the antitrust proviso contained in Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 998 F.2d 1129. The opinion and final order of the Federal Trade Commission (Pet. App. 37a-128a) and the initial decision of the administrative law judge (Pet. App. 129a-238a), are reported at 112 F.T.C. 344.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1993. A petition for rehearing was denied on August 30, 1993. Pet. App. 35a-36a. The petition for a writ of certiorari was filed on November 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are five large title insurance companies. In addition to insuring buyers of real property against losses due to defects in title, petitioners also sell title search and examination services in many States.[1] Beginning in the 1960's, petitioners organized "rating bureaus" in a number of States to fix prices for title search and examination services. Pet. App. 207a. The Federal Trade Commission found that title search and examination is not the "business of insurance" under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), and that, accordingly, petitioners' price fixing is not exempt from the federal antitrust laws. The court of appeals affirmed.

1. On January 7, 1985, the Commission issued an administrative complaint alleging that petitioners had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by collectively setting rates for title search and examination services. The complaint did not challenge petitioners' practice of setting uniform rates for title insurance. Pet. App. 40a.

Petitioners defended against antitrust liability on three grounds. First, petitioners contended that their fixing of search and examination fees was exempt under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), which protects the "business of insurance" from antitrust liability to the extent that it is "regulated by state law." Second, petition-

[1] A title search is a compilation, in chronological order, of publicly recorded instruments in the chain of title. A title examination is an evaluation of the legal significance of those instruments.

ers argued that their price-fixing was protected under the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943). Finally, petitioners claimed that the challenged conduct was petitioning activity, protected under the *Noerr-Pennington* doctrine.

In December 1986, the administrative law judge (ALJ) issued a decision concluding that petitioners' activities, which plainly violated the FTC Act unless they were exempt from the federal antitrust laws, were not part of the "business of insurance." Pet. App. 208a-220a. The ALJ also rejected the *Noerr-Pennington* defense (Pet. App. 233a-234a) and held that the state action doctrine protected petitioners from antitrust liability in some States, but not in others. Pet. App. 221a-232a.

2. In September 1989, the Commission issued a final order and opinion prohibiting petitioners from fixing prices for search and examination services in six States. Pet. App. 37a-39a. The Commission held that petitioners were not protected from antitrust liability by the *Noerr-Pennington* doctrine (Pet. App. 92a-99a), and that state action immunity was not available in six States. Pet. App. 44a-72a. The Commission also concluded that petitioners' conduct was not exempt from antitrust scrutiny under the McCarran-Ferguson Act, because petitioners' practice of setting uniform rates for conducting a search and examination of title was not part of the "business of insurance." Pet. App. 73a-92a.

In reaching that conclusion, the Commission applied the three-factor test for identifying the "business of insurance" that this Court articulated in *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119 (1982), and *Group Life & Health Ins. Co.* v. *Royal*

Drug Co., 440 U.S. 205 (1979). As to the first factor of that test—*i.e.*, whether the practice has the effect of transferring or spreading a policyholder's risk—the Commission concluded that search and examination services are not underwriting "in the sense of assuming and spreading risk among a universe of insureds." Pet. App. 80a. The Commission noted that "[s]tandard title reports contain standard limitations in the form of a general notice that the policy will not insure against loss from any title defects listed in an exceptions schedule attached to the [title] report," and that "title insurers strictly require their agents and employees to list all enforceable or even doubtful title defects, liens, and encumbrances in the exceptions schedule." Pet. App. 80a-81a. Accordingly, petitioners' agents and employees, as searchers and examiners of title, exercise no underwriting discretion in writing title reports or policies. Pet. App. 81a.

As to the second *Royal Drug-Pireno* factor—*i.e.*, whether the practice is an integral part of the policy relationship between the insurer and the insured—the Commission held that "correctly applied to title insurance, the 'insurer-insured' relationship only extends to the decision of whether a particular defect should be given coverage, such as whether or not to provide coverage for mechanics liens." Pet. App. 89a. The Commission agreed with complaint counsel that "[t]he legal examination of title that merely reports, in a given case, whether a mechanics' lien has been filed, is a *legal determination* that is unrelated to insurance company decisions regarding the coverage of policies." *Ibid.* (emphasis added).

Finally, the Commission concluded that the third part of the test—*i.e.*, whether the practice is limited

to entities within the insurance industry—was not satisfied. Pet. App. 89a-90a. The Commission explained that "search and examination services are commonly provided apart from any 'insurance' trappings" (Pet. App. 90a), and by "persons that do not participate in the insurance business (such as independent attorneys providing opinions)." Pet. App. 90a-91a.

3. In January 1991, the court of appeals, without reaching petitioners' McCarran-Ferguson or *Noerr-Pennington* claims, reversed and vacated the Commission's order on the ground that petitioners' price-fixing was exempt from federal antitrust scrutiny under the state action doctrine. *Ticor Title Ins. Co.* v. *FTC*, 922 F.2d 1122 (3d Cir. 1991). This Court granted certiorari to review that holding, and it reversed. The case was remanded to the court of appeals "for further proceedings consistent with [the Court's] opinion." *FTC* v. *Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2180 (1992).

4. On remand, the court of appeals affirmed the Commission's final order. Pet. App. 1a-32a. The court of appeals first concluded that petitioners did not show, in the States that remained at issue, that their rate-setting schemes were "actively supervised." Accordingly, the court held that petitioners could not claim immunity under the state action doctrine. Pet. App. 20a-26a. The court of appeals also rejected petitioners' reliance on the *Noerr-Pennington* doctrine, because petitioners' "collective rate setting efforts can 'more aptly be characterized as commercial activity with a political impact' . . . than as political activity with a commercial impact." Pet.

App. 20a, quoting *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 507 (1988).

With respect to petitioners' claim of immunity under the McCarran-Ferguson Act, the court of appeals held that title search and examination services, which are "historically independent of the business of insurance" (Pet. App. 19a), do not satisfy any part of the *Royal Drug-Pireno* test. Pet. App. 10a-19a. First, the court concluded that "[t]he title search and examination does not itself spread or transfer risk." Pet. App. 11a. The court explained that "title searchers identify defects of title. Title searchers themselves have no power to insure against any risk they identify." *Ibid.* Second, the court concluded that the title search and examination is not "integrated into or encompassed within the relationship between the insurer and insured that flows from the policy." *Ibid.* Finally, the court concluded that "[t]he fact that title search and examination services, in many cases, still are not provided or performed by the title insurance companies themselves also indicates that the third [*Royal Drug-*] *Pireno* criterion, whether the challenged practice is limited to entities within the insurance industry, is not satisfied either." Pet. App. 12a.

Judge Alito dissented. Pet. App. 27a-32a. He disagreed with the majority's decision to examine the challenged practices apart from the issuance of the policy, and concluded that "a title search and examination performed as part of issuing title insurance cannot be dissected from the rest of the policy-issuing process for the purpose of applying the McCarran-Ferguson Act." Pet. App. 29a.

ARGUMENT

The court of appeals correctly rejected petitioners' claim that title search and examination services, when sold by petitioners or their agents in a package with title insurance, are part of the "business of insurance" under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). The court's decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Petitioners concede that their entitlement to the McCarran-Ferguson exemption must be decided under the test applied by the court of appeals—*i.e.*, the three criteria identified by this Court for determining what is the "business of insurance" under that Act. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, *supra*; *Union Labor Life Ins. Co.* v. *Pireno*, *supra*. Their sole disagreement is with the court's application of that test to the facts of this case. Contrary to petitioners' contentions, the court of appeals faithfully applied the *Royal Drug-Pireno* test.

Conducting a search of public land records and rendering a legal opinion as to the significance of any defects in title uncovered by the search are services that do not transfer or spread risk, "one indispensable characteristic of insurance." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. at 127, quoting *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. at 211-212. A title examination is performed before every real estate purchase, whether or not the purchaser also chooses to acquire title insurance. The primary objective of a title examination is to uncover any outstanding interests reflected in the chain of title so

that a prospective buyer or lender can make an informed decision as to whether to attempt to cure the revealed defects or to just drop the deal. Pet. App. 142a. Title examiners make legal judgments; they exercise no underwriting discretion and, indeed, are prohibited from assessing or assuming the risk of loss from any revealed title defects.[2] Pet. App. 161a-163a.

To be sure, petitioners' insurance underwriting policies require any revealed defects in title to be excepted from coverage. Pet. 3. It does not follow, however, that the title examination spreads or underwrites risk. See *United States* v. *Title Ins. Rating Bureau of Arizona, Inc.*, 700 F.2d 1247, 1251 (9th Cir. 1983) (*TIRBA*), cert. denied, 467 U.S. 1240 (1984). As this Court emphasized in *Royal Drug*, "[t]here is an important distinction between *risk underwriting* and *risk reduction*. By reducing the total amount it must pay to policyholders, an insurer reduces its liability and therefore its risk. But unless there is some element of spreading risk more widely, there is no underwriting of risk." *Royal Drug*, 440 U.S. at 214-215 n.12 (emphasis added).[3]

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[2] Although the title examiner is authorized to omit from the title report any pre-existing interests that are no longer enforceable (Pet. App. 161a), those are *legal* judgments, not underwriting. See *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 785 (1975). Indeed, *Goldfarb* held that those activities, when performed by attorneys, are subject to the full force of the antitrust laws.

[3] Petitioners err in asserting (Pet. 10) that the court of appeals' decision, by requiring that the challenged practice *itself* spread or transfer risk, "narrows the first [*Royal Drug-Pireno*] criterion to an extent that makes it virtually meaningless." That claim rests on a mischaracterization of the court's opinion

Nor are search and examination services "an integral part of the *policy* relationship between the insurer and the insured." *Pireno*, 458 U.S. at 129 (emphasis added). It is obvious that the legal examination of title is distinct from the contract of insurance itself. As the Commission explained, "[t]he legal examination of title that merely reports, in a given case, whether a mechanics' lien has been filed, is a *legal* determination that is unrelated to insurance company decisions regarding the coverage of policies." Pet. App. 89a. The distinction is further reflected in the fact that "the [title insurance] industry itself separates out the concept of risk by having separate 'risk' rates (not at issue herein)," and bills for search and examination services "at a price that is entirely removed from any consideration of whatever risk element may be involved in title insurance." Pet. App. 84a.

As to the third *Royal Drug-Pireno* factor, petitioners' title search and examination services form a separate, noninsurance line of business. Petitioners'

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as having circumscribed that factor to encompass nothing more, and perhaps less, than "signing the policy." Pet. 10. In addition, petitioners' argument overlooks that the first factor of the *Royal Drug-Pireno* test is intended to identify a core characteristic of insurance, not to be the sole and exclusive test for the availability of the McCarran-Ferguson exemption. While it is manifest that practices that themselves spread risk have a compelling claim to exemption under the Act, the remaining factors of the test seek to identify other practices that are worthy of exemption. Petitioners' argument fails not because the court of appeals applied too narrow a view of the *Royal Drug-Pireno* test, but because their title search and examination activities are legal work, far removed from the traditional understanding of what constitutes underwriting.

price-fixing conduct therefore plainly implicates noninsurance entities and noninsurance markets. As the ALJ observed, "historically search and examination were offered, and are still offered, apart from any concept of insurance or insurance risk spreading." Pet. App. 217a. Title insurance "is largely a post-World War II phenomenon." Pet. App. 144a.[4] Thus, at the time of enactment of the McCarran-Ferguson Act in 1945, most real estate transactions did not involve the purchase of title insurance at all.[5] In fact, in some areas of the country "the attorney's opinion is still commonplace especially in New England and the Southeastern states." Pet. App. 145a.[6]

Moreover, the record shows that a title search and examination is not a mere "condition precedent" (Pet. 14) to the issuance of a title insurance policy. The

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[4] *United States* v. *Home Title Ins. Co.*, 285 U.S. 191, 195 (1932), is not to the contrary. It held merely that in 1932, a company that derived income from guaranteeing loans, insuring title, and receiving fees and charges for examination of title, was an "insurance company" under the Internal Revenue Code.

[5] In holding that the challenged contracts were not part of the "business of insurance," this Court in *Royal Drug* recognized that common perceptions at the time of enactment of the McCarran-Ferguson Act regarding the scope of the business of insurance are "highly significant in ascertaining congressional intent." *Royal Drug Co.*, 440 U.S. at 227.

[6] In Iowa, property is transferred on the basis of the traditional attorney opinion letter. Because of a statutory prohibition on the sale of title insurance, property owners are unable to purchase the extra layer of protection provided by title insurance. Pet. App. 138a. Virginia permits the sale of title insurance, but, as noted in *Goldfarb* v. *Virginia State Bar*, 421 U.S. at 775, provides that title examination services may be sold lawfully only by independent attorneys.

fact that petitioners have made a business decision to limit the scope of the risk they will assume by excluding revealed defects in title clearly is not sufficient to transform the business of conducting title examinations into the "business of insurance." As the Court noted in *Royal Drug*, "it does not follow that because an agreement is necessary to provide insurance, it is also the 'business of insurance.' " *Royal Drug*, 440 U.S. at 213-214 n.9. The "main purpose" of the title examination is to give the buyer or lender "a full accounting of any title defects so that an informed decision can be made as to whether to attempt to cure the revealed defects or to just drop the deal." Pet. App. 142a. Today, in most parts of the country, once the basic purchasing decision is made, the property owner commonly purchases title insurance to protect himself against losses incurred as a result of errors or omissions by the examiner, or from "hidden defects not discoverable by a diligent record search." *Ibid.* But the prospective purchaser's need for a title examination—to make the basic purchasing decision—is independent of his need for the protection provided by title insurance.

Finally, contrary to petitioners' contention (Pet. 12), the court of appeals did not err by disregarding the fact that "[t]he rating bureau rates challenged by the Commission were to be charged only by title insurers or their agents." Insurance companies are themselves acting as entities outside the insurance industry when they provide noninsurance services, even in connection with the sale of insurance. See, *e.g.*, *Insurance Bd. Under Social Ins. Plan of Bethlehem Steel Corp.* v. *Muir*, 819 F.2d 408, 412 (3d Cir. 1987); *TIRBA*, 700 F.2d at 1252. It is not true,

therefore, that the third criterion is satisfied here merely because "there was no claim [by the Commission] that the price-fixing practices extended to approved attorneys, independent attorneys, abstractors, surveyors or anyone else besides [petitioners'] own agents and employees." Pet. 12.

In the end, petitioners cannot avoid the fact that title search and examination services can be, and are, provided by entities wholly unrelated to the insurance industry, and those services can be, and are, used not only by insurers and those being insured, but also by others. Under this Court's cases, an insurer's decision to integrate vertically by providing those services in-house does not transform those services into the "business of insurance," even if it does make them the business of an insurance company.

2. The court of appeals' decision is consistent with other recent precedents of the courts of appeals, which, like this Court, have recognized that the McCarran-Ferguson Act exempts from the antitrust laws "the 'business of insurance,' and not the 'business of insurance companies.'" *Pireno*, 458 U.S. at 129. In particular, the courts of appeals have recognized that the "business of insurance" would be extended far beyond the intent of Congress if insurance companies could broaden the scope of the statutory term simply by diversifying into noninsurance markets. See *TIRBA*, *supra* (real estate escrow services); *Muir*, 819 F.2d at 412; *Perry* v. *Fidelity Union Life Ins. Co.*, 606 F.2d 468, 470 (5th Cir. 1979) (insurance premium financing), cert. denied, 446 U.S. 987 (1980); *Cody* v. *Community Loan Corp.*, 606 F.2d 499, 502-503 (5th Cir. 1979) (insurance premium financing), cert. denied, 446 U.S 988 (1980). Such an

elastic exemption from the antitrust laws would be quite anomalous, in light of this Court's repeated admonition that "exemptions from the antitrust laws must be construed narrowly." *Pireno*, 458 U.S. at 126; see also *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2210 (1993).

Indeed, petitioners' rationale for sweeping title search and examination services under the "business of insurance" was specifically considered and rejected by the Ninth Circuit in *TIRBA* with respect to petitioners' similar practice of charging uniform fees for escrow (*i.e.*, settlement or "closing") services. In *TIRBA*, the title insurers contended that the first of the *Royal Drug-Pireno* factors was satisfied because escrow agents identify encumbrances and other "defects," which were then listed as exceptions to coverage on the title insurance policy. *TIRBA*, 700 F.2d at 1251. The Ninth Circuit held that those services "merely reduce[d] costs to the insurer," and did not "spread or underwrite title insurance risk." *Ibid.* The second *Royal Drug-Pireno* factor was not satisfied either, the Ninth Circuit ruled, because "some people who buy escrow services do not buy title insurance," and vice versa and "those who buy both enter into two separate agreements: one for title insurance, the other for escrow services." *Id.* at 1252. As to the final *Royal Drug-Pireno* factor, *TIRBA* concluded that "immunizing price-setting by insurance companies who perform escrow services would distort competition by those who are not insurance companies." *Ibid.*[7]

[7] Petitioners err in asserting that the Commission acknowledged below that search and examination play a greater role in determining the scope of the risk than the escrow services at

The court of appeals' conclusion that petitioners' title search and examination services are not part of the "business of insurance" is consistent with the decision of the Ninth Circuit in *TIRBA*, and accords fully with the other decisions of the courts of appeals cited above. By contrast, the district court cases on which petitioners rely (Pet. 7, 14) and *Commander Leasing Co.* v. *Transamerica Title Ins. Co.*, 477 F.2d 77 (10th Cir. 1973), were decided long before this Court's decision in *Royal Drug*, when "an expansive perception of the 'business of insurance' requirement prevailed in a majority of the circuit courts of appeals." *TIRBA*, 700 F.2d at 1251, citing *Portland Retail Druggists Ass'n* v. *Kaiser Foundation Health Plan*, 662 F.2d 641, 647 (9th Cir. 1981). The court of appeals was correct in declining to accept that obsolete expansive reading of the scope of "business of insurance."

3. Petitioners' claim that the decision of the court of appeals will subject all administrative steps involved in the underwriting process to antitrust scrutiny rests on the erroneous assumption that those administrative activities are "analogous to search and examination." Pet. 15. In fact, the Commission's undisputed factual findings establish that search and examination services are independent, historically and functionally, of the business of selling title insurance. Petitioners' speculative fear (Pet. 15-16) that a dictum in the court of appeals' opinion might be read broadly to support the proposition

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issue in *TIRBA*. In fact, in its briefing below the Commission merely stated that "it is not dispositive that title search and examination may play a greater role." Brief for Federal Trade Commission at 23 n.25 (3d Cir. filed May 23, 1990).

that all preparatory steps involved in issuing a policy of insurance are subject to antitrust scrutiny does not warrant review by this Court.

Petitioners' claim (Pet. 17) that the decision of the court of appeals has broad implications for the scope of federal preemption under the ERISA statute[8] is similarly unfounded. ERISA's saving clause, 29 U.S.C. 1144(b)(2)(A), saves from federal preemption any state law that "regulates insurance." That clause was designed to preserve the McCarran-Ferguson Act's reservation of regulation of the business of insurance to the States—which is the subject of the *first* part of Section 2(b) of the Act. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 744 n.21 (1985). This case, however, involves the antitrust proviso of the Act (the *second* part of Section 2(b)), which applies to private conduct and is more "narrowly circumscribed" than the McCarran Act's savings clause for state regulation. See *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. at 2209. Therefore, there is no sound basis for petitioners' assertion that the court of appeals' decision has "legal implications" for "the scope of federal pre-emption effected by the ERISA statute." Pet. 17.

[8] Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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